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No. 406

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

TRI-CITY BROADCASTING CO.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO
Appellee.

JURISDICTIONAL STATEMENT

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TRI-CITY BROADCASTING CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT

Appellant appeals form the judgment of the Supreme Court of Ohio entered on April 22, 1959, reversing the Court of Appeals of Ohio for the Seventh Appellate District. This statement is submitted to show that the Supreme Court of the United States has jurisdiction over the appeal and that a substantial question is presented.

I

REFERENCE TO OPINIONS BELOW

The opinion of the Board of Tax Appeals was entered May 29, 1957, being Case No. 32663 on the Board's docket (unreported, see Appendix I).

The entry of the Court of Appeals was entered January 4, 1958, being Case No. 942 of the Court's docket (unreported, see Appendix II).

The opinion of the Supreme Court of Ohio was entered April 22, 1959, *Tri-City Broadcasting Co. v. Bowers*, 169 Ohio St. 126, 158 N. E. 2d 203 (see Appendix III). Rehearing denied May 13, 1959.

II

STATEMENT OF GROUNDS OF JURISDICTION

Proceedings leading to this appeal began when the appellant filed an application for refund of use tax paid on broadcast transmitting equipment. The commissioner denied the application for refund on July 31, 1956. Appellant then appealed to the Board of Tax Appeals of Ohio, and on May 29, 1957, the Board entered its decision holding that Section 5741.02, Revised Code of Ohio, could constitutionally tax the installation of appellant's broadcast transmitting equipment.

Subsequently, appellant appealed to the Court of Appeals for the Seventh Appellate District (see Appendix IV), and the Court reversed the Board, holding that the incidence of the Ohio use tax is upon the principal and primary use and since appellant's broadcast transmitting equipment is used principally and primarily in interstate commerce it therefore is protected from the use tax imposed by Section 5741.02, Revised Code of Ohio, by virtue of the commerce clause of the Constitution of the United States, and that a contrary holding would render the section unconstitutional (see Appendix II).

The tax commissioner appealed to the Supreme Court of Ohio, (see Appendix VI), which allowed the appeal on the constitutional question, and reversed the Court of Appeals, holding that the installation of appellant's broadcast transmitting equipment was subject to the use tax

imposed by Section 5741.02, Revised Code of Ohio, and that the said section thus construed and applied did not violate the commerce clause of the Constitution of the United States, *Tri-City Broadcasting Co. v. Bowers*, 169 Ohio St. 126, 158 N. E. 2d 203, decided April 22, 1959, journalized by entry on the same date (see Appendix III). Application for rehearing was denied May 13, 1959, and the denial journalized by entry on the same date.

From the above judgment notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio on June 24, 1959.

III

STATUTES AND CASES

This is an appeal taken pursuant to 28 U.S.C.A., Section 1257 (2), and the cases believed to sustain the Court's jurisdiction are: *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106; *Zucht v. King*, 260 U. S. 174, 67 L. Ed. 194, 43 S. Ct. 24; *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67, 73 L. Ed. 184, 49 S. Ct. 61; *Charleston Federal Savings and Loan Association v. Alderson*, 324 U. S. 182, 89 L. Ed. 857, 65 S. Ct. 624.

The principal statute pertaining to the issues in this case is Section 5741.02, Revised Code of Ohio, (Title 57, *Page's Ohio Revised Code Annotated*, pages 394, 395; *Baldwin's Ohio Revised Code and Service*, Title 57, page 233), providing in material part:

> "(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased for storage, use, or other consumption in this state, as follows:
>
> "(1) No tax, if the price for which such property has been purchased is less than forty-one cents;

"(2) Two cents if such price is more than forty cents and not more than seventy cents;

"(3) Three cents, if such price is more than seventy cents and not more than one dollar;

"(4) If such prices is in excess of one dollar, three cents on each full dollar thereof; and if such price is not an even number of dollars, then, in addition to said tax on each full dollar, one cent, if such price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents, if such excess is more than forty cents and not more than seventy cents; and three cents, if such excess is over seventy cents.

* * * * * * * * * * *

"(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

* * * * * * * * * * *

"(3) Property, the storage, use or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and secton 5739.02 of the Revised Code;

* * * * * * * * * * *"

Other exemptions from the Ohio use tax are contained in Section 5741.01, Revised Code of Ohio (Title 57, *Page's Ohio Revised Code Annotated*, page 392; Volume 6 *Bald-*

win's Ohio Revised Code and Service; Title 57, pages 230, 231):

"As used in sections 5741.01 to 5741.22, inclusive, of the Revised Code:

* * * * * * * * * * *

"(C) 'Use' means and includes the exercise of any right or power incidental to the ownership of the thing used, except as provided in this division of this section.

"When the purpose of the consumer is any of the following: (1) To resell the thing purchased in the form in which the same has been received by him; (2) To incorporate the thing purchased as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining, or to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, processing, refining, or mining including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horiticulture, or floriculture, and persons engaged in rendering farming, agricultural, horiticultural, or floricultural services and services in the exploration for and production of crude oil and natural gas for others are deemed engaged directly in farming, agriculture, horiculture, or floriculture, or exploration for and production of crude oil and natural gas; or directly in making retail sales or directly in the rendition of a public-utility service; (3) To hold the thing transferred as security for the performance of an obligation of the seller, or to use or consume the thing transferred directly in industrial cleaning of tangible personal property; or to use or consume the thing transferred directly in the rendition of towel and linen service or supply; such service or supply is not deemed a rental, but is deemed a personal service transaction; (4) To resell, hold, use or consume the thing transferred as evidence of a contract of insurance; (5)To use or consume the thing directly in commercial fishing; the attainment

of such a purpose shall not be considered to be a st
age, a use, or a consumption of the thing purchas

The above statutes are set out in their entirety
Appendix V.

These statutes have been construed and applied by t
Ohio Supreme Court, the Ohio Board of Tax Appeals, a
the Ohio tax commissioner as exempting tangible perso
property used principally and primarily in an exem
activity, even though such property might otherwise
stored or used for short times in non-exempt activiti
and as imposing a use tax only upon property us
principally and primarily in a taxable activity (see di
cussion under Topic VI, "The Questions are Substantia
infra).

IV

QUESTIONS PRESENTED

This appeal presents the following questions:

First, does a state statute which imposes a use ta
upon the principal and primary use of tangible persona
property in all instances excepting where the propert
is used in interstate commerce, and then upon the inci
dental use required for installation, discriminate agains
interstate commerce in violation of the commerce claus
of the Constitution of the United States?

Second, does a state statute which imposes a use ta
upon the principal and primary use of tangible persona
property, place a direct tax burden upon the use o
tangible personal property used principally and primarily
in interstate commerce and thereby violate the commerce
clause of the Constitution of the United States?

Third, is the field of broadcasting national in scope or has the field been pre-empted by the Congress so as to exclude the State from imposing its use tax upon the use or installation for use of broadcast transmitting equipment?

V

STATEMENT OF CASE

A. Material Facts.

The facts have been stipulated:

"It is stipulated and agreed by and between counsel for the respective parties hereto that the following stipulation shall be considered as the facts for all purposes pertinent to the consideration and decision of the above case:

"(1) The appellant, Tri-City Broadcasting Company, owns and operates television station WTRF-TV, with studios in Wheeling, West Virginia, and transmitter at Bridgeport, Ohio. Appellant's transmitter broadcasts principally over a tri-state area, including Ohio, West Virginia, and Pennsylvania, (see Exhibit "B"), under license granted by the Federal Communications Commission, with an assigned frequency of 174 to 180 megacycles and an assigned visual power of 360 kilowatts. Approximately two-thirds of appellant's viewers are outside of Ohio, and approximately three-fourths of appellant's advertisers are outside of Ohio.

"(2) All of appellant's programs originate either at its studios in Wheeling, or at various studios of the National Broadcasting Company's network throughout the country. All programs are carried from appellant's control room in its studios at Wheeling to the transmitter by way of a telephone cable across the Ohio River, and from the transmitter to receiving sets in the tri-state area (see Exhibit "B").

"(3) Appellant purchased outside of Ohio from Radio Corporation of America, Camden, New Jersey,

certain items of transmitting equipment to be employed in the transmitter at Bridgeport (see Exhibit "A"). Use tax on these items was paid under direct pay permit No. 129-M. For purposes of this case, Ohio purchases and the sales tax there have been conceded.

"(4) The items of equipment in question, which have been listed in Exhibit "A", were shipped ready for installation, by motor freight directly from Camden, New Jersey, to the transmitter at Bridgeport. Under operating authority granted by the Federal Communications Commission (Permit No. BMPCT 1825), the station began transmitting operations on July 30, 1953. Thereafter appellant installed additional items of transmitting equipment, (see Exhibit "A"), as they arrived at the transmitter, within one to three day after arrival, to bring the transmitter's power up to the permitted assigned power of 360 kilowatts. The items have been used in the transmitter ever since.

"(5) Exhibit "A", includes no storage inventories or inventories of replacement parts."

B. Stage at which the Constitutional Objection was Raised.

Since under Ohio law neither the Ohio tax commissioner nor the Ohio Board of Tax Appeals has jurisdiction to declare a statute unconstitutional, *East Ohio Gas Co. v. Public Utilities Commission*, 137 Ohio St., 225, 28 N.E. 2d 599, the first effective opportunity afforded to raise the constitutional objection was before the Ohio Court of Appeals and the Ohio Supreme Court, *Yakus v. United States*, 321 U.S. 414, 444, 88 L. Ed. 834, 64 S. Ct. 660. This was done by the taxpayer in its notice of appeal to the Court of Appeals (see Appendix IV) and by the tax commissioner in his appeal to the Supreme Court of Ohio through his assignment of errors (see Appendix VI).

Not only was the constitutional objection properly raised, but it was also directly passed upon by both the Court of

Appeals and the Ohio Supreme Court, *Charleston Federal Saving and Loan Association v. Alderson*, 324 U.S. 182, 89 L. Ed. 857, 65 S. Ct. 624. The journal entry of the Court of Appeals held as follows:

> "This appeal from the Board of Tax Appeals of Ohio came on for hearing December 5, 1957, and pursuant to briefs and arguments by counsel, it was accordingly decided and held by this court that the Ohio use tax levied by Section 5741.02, Revised Code, is an excise tax levied only against personal property purchased for and used principally and primarily in a taxable way; that broadcast transmitting is an interstate commerce activity; that broadcast transmitting equipment purchased by Appellant Tri-City Broadcasting Company is used principally and primarily in interstate commerce; that therefore such equipment is exempted under the provisions of Section 5741.02 (C) (3), Revised Code; that to impose a use tax on the equipment would violate Article I, Section 8, Clause 3 of the Constitution of the United States; that to impose a use tax on the equipment would discriminate against interstate commerce and burden such commerce in violation or Article I, Section 8, Clause 3 of the Constitution of the United States; that therefore, appellant's broadcast transmitting equipment can not constitutionally be subjected to the use tax levied by Section 5741.02, Revised Code, and that a contrary holding would bring Section 5741.02, Revised Code, into conflict with Article I, Section 8, Clause 3 of the Constitution of the United States. The decision of the Board of Tax Appeals is reversed. To all of which the appellee Tax Commissioner excepts. No further opinion."

And the holding of the Ohio Supreme Court will be found in the syllabus of the case which reads:

> "Transmitting equipment purchased in interstate commerce and shipped from a point outside this state to a point within this state, for immediate installation in a radio and television transmitters under construction in this state, and installed therein within a few

days after arrival for principal use thereafter in interstate broadcasts from such radio and television transmitter is subject to the use tax levied by Section 5741.02, Revised Code. This section does not violate Clause 3, Section 8, Article I of the Constitution of the United States, providing that the Congress shall have the power 'to regulate commerce with foreign nations and among the several states,' for the reason that such tax is imposed on all property purchased for storage, use, or consumption in this state at a time when such property has come to rest within this state and is a nondiscriminatory tax which, when applied to the instrumentalities of interstate commerce, does not constitute a prohibited burden upon such commerce."

From the foregoing discussion, appellant concludes that the constitutional objection was properly raised and that the Court of Appeals and the Ohio Supreme Court passed directly upon the constitutionality of the statute.

VI

THE QUESTIONS ARE SUBSTANTIAL

A. Section 5741.02, Revised Code of Ohio, as construed and applied by the Supreme Court of Ohio, burdens and discriminates against interstate commerce in violation of the Constitution of the United States.

The only reason the appellant has been assessed for the tax in this case is because appellant is engaged in interstate commerce. To understand the import of this statement, it is necessary to review a fundamental point of the Ohio law as it applies to the Ohio Use Tax Statute and to this case. The Ohio Supreme Court has consistently held that the Ohio use tax imposed by Section 5741.02, Revised Code of Ohio, cannot be apportioned between

exempt and non-exempt uses; that the incidence of the tax is upon the principal and primary use of equipment; and that therefore the Ohio Use Tax Statute does not tax incidental storages or uses when the principal and primary use of the equipment is exempt, *Mead Corp. v. Glander*, 153 Ohio St. 539, 93 N.E. 2d 19; *Erie Railroad Co. v. Peck*, 160 Ohio St. 322, 116 N.E. 2d 304; *Roche Bros. Inc. v. Bowers*, 166 Ohio St. 396, 143 N.E. 2d 123. This holding has been followed and applied by the Ohio Board of Tax Appeals and the tax commissioner.[1] Now the facts in this case show beyond any dispute that appellant's broadcast transmitting equipment is used principally and primarily in rendering an interstate service, i.e. interstate broadcasting, which is exempt under the State's Use Tax Statute, Section 5741.02 (C) (3), Revised Code of Ohio,[2] by virtue of the commerce clause of the Constitution of the United States, *Helson v. Kentucky*, 279 U.S. 245, 73 L. Ed. 683, 49 S. Ct. 279; *Cooney v. Mountain States Telephone and Telegraph Co.*, 294 U.S. 384, 79 L. Ed. 934, 55 S. Ct. 477; *Southern Pacific Co., v. Gallagher*, 306 U.S. 167, 83 L. Ed. 586, 59 S. Ct. 389; *Pacific Telephone and Telegraph Co. v. Gallagher*, 306, U.S. 182, 83 L. Ed. 595, 59 S. Ct. 396; *Joseph v. Carter & Weekes Stevedoring Co.*, 330

[1] *International Derrick and Equipment Company v. Glander*, Ohio Board of Tax Appeals, No. 16683 (decided June 29, 1950), holding that equipment used 65% of the time in an exempt activity and 35% of the time in a taxable activity was exempt; *Jeffers v. Peck*, Ohio Board of Tax Appeals, Nos. 22990, 21975 (decided March 16, 1953), holding that equipment used 90% of the time in a taxable activity and 10% of the time in an exempt activity was taxable; *Harvey Transfer Company v. Bowers*, Ohio Board of Tax Appeals, No. 38916 (decided June 18, 1959), holding that equipment not employed primarily in an exempt manner was taxable. The policy of the Ohio Tax Commissioner is stated in Circular No. 10 (promulgated June 1, 1953) set forth in Appendix VII.

For comments of the tax services, Commerce Clearing House and Prentice-Hall, see Appendix VIII.

[2] See Appendix V.

U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815; *Station WBT v. Poulnot*, 46 F. 2d. 671.[3]

However, instead of following the normal rule applicable to every other Ohio taxpayer that the incidental storage and use involved in the installation of equipment are not taxable under the state's Use Tax Statute, the Ohio Supreme Court in its decision has carved out a specific exception to the rule whenever the equipment is necessary to and used in interstate commerce, and accordingly has affirmed the tax against the extremely short time of use required for installation of such equipment irrespective of the exempt character of the principal and primary use of the equipment. It is obvious that the installation of appellant's transmitting equipment is not the principal and primary use of the equipment. And it is equally obvious that unless the principal and primary use rule is applied uniformly to interstate commerce businesses the same as it is to other taxpayers, the result will be a discrimination against interstate commerce. This tax on installation, applicable as it is only to interstate commerce and never otherwise applied to any other taxpayer, discriminates against interstate commerce by subjecting interstate business to a special tax and for the sole reason that the business is interstate.

[3] For holdings that broadcasting is interstate commerce see *Radio Commission v. Nelson Bros.*, 289 U.S. 266, 77 L. Ed. 1166, 53 S. Ct. 627; *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650, 80 L. Ed. 956, 56 S. Ct. 608; *Whitehearst v. Grimes*, 21 F. 2d. 787; *Duncan v. United States*, 48 F. 2d, 128; *United States v. American Bond and Mortgage Co.*, 31 F. 2d, 448, 52 F. 2d, 318, *cert. den.*, 285 U.S., 538, 76, L. Ed., 931, 52 S. Ct. 311; *General Electric Co. v. Federal Radio Commission*, 31 F. 2d, 630; *Technical Radio Laboratory v. Federal Radio Commission*, 36 F. 2d., 111; *City of New York v. Federal Radio Commission*, 36 F. 2d., 115; *Pulitzer Publishing Co. v. Federal Communications Commission*, 94 F. 2d., 249; *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 47 F. 2d., 670; *National Broadcasting Co., Inc. v. Board of Public Utility Commissioner of New Jersey*, 25 F. Supp. 761, 27 Public Utility Reports (N.S), 314; *Tampa Times Co. v. Burnett, Tax Collector*, 45 F. Supp., 166; 35 *Opinions of Attorney Generdl*, (U.S.) 126, 128.

Appellant notes in passing that it has never objected to paying the same taxes as required of other Ohio taxpayers. What it does object to in this case, and it has urged the objection all through the course of the litigation, is being selected for a special tax burden merely because it happens to be engaged in business in the field of interstate commerce.

The Ohio Supreme Court rests its decision entirely upon two authorities, *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 83 L. Ed. 586, 59 S. Ct. 389, and *Pacific Telephone and Telegraph Co. v. Gallagher*, 306 U.S. 182, 83 L. Ed. 595, 59 S. Ct. 396. In those cases this Court did uphold the constitutionality of a use tax imposed upon the installation of interstate commerce equipment, but the essential difference between those cases and this is that the statute there before the Court[4] had not been limited by local interpretation to the principal and primary use of property as has the Ohio statute. Consequently there was no discrimination since all equipment was taxed alike on installation, and not just that used in interstate commerce. Moreover, this Court was very careful to point out on page 178 of the reported opinion that a discriminatory tax would not be sustained; see also *Gwin, White & Prince, Inc., v. Henneford, et al.*, 305 U.S. 434, 83 L. Ed. 272, 59 S. Ct. 325; *McGoldrick, Comptroller v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 84 L. Ed. 565, 60 S. Ct. 388, *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815. And this is true even though the tax might not be directly upon interstate commerce, *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 96 L. Ed. 436, 72 S. Ct. 424.

A typical example of the discrimination about which appellant complains will be found by reference to the case of *Erie Railroad Co. v. Peck*, 160 O.S. 322, 116 N.S. 2d 304,

[4] See Appendix IX.

where the Ohio Supreme Court held that tangible personal property being installed in a railroad station was exempt under the exemption provisions of the Ohio statute as used directly in rendering a public utility service. Since the property, after its installation in the station became real property, the only use involved was the installation itself. Comparing *Erie Railroad* with the instant case, in *Erie Railroad* the installation which took some months was exempted from tax, whereas here the installation of appellant's interstate commerce equipment, which the facts show usually required no more than one day and never more than three days, has been assessed for tax. The one difference between the two cases is that the taxpayer here claims exception by reason of the interstate commerce clause of the United States Constitution, which is no difference at all.

If other taxpayers are taxed or exempted according to principal and primary use then so must interstate commerce.

To the extent that Section 5741.02, Revised Code of Ohio, as construed and applied by the Supreme Court of Ohio, burdens and discriminates against interstate commerce, the said Section in opposition to the commerce clauses of the Constitution of the United States and therefore unconstitutional.

B. Broadcasting is National in its Scope and Congress has Pre-empted the Field.

It is a well established principle that matters which are national in scope so as to require uniform legislation, and matters as to which Congress has pre-empted the field by appropriate legislation are entirely excluded from state interference. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Leisy v. Hardin*, 135 U.S. 100, 34 L. Ed. 128, 10 S. Ct. 681; *Charleston W. C. R. Co. v. Varnville*, 237 U.S. 597,

59 L. Ed. 1137, 35 S. Ct. 715; *Napier v. Atlantic Coast Ry.* 272 U.S. 605, 71 L. Ed. 432, 47 S. Ct. 207; *Missouri P. R. Co. v. Porter*, 273 U.S. 341, 71 L. Ed. 672, 47 S. Ct. 383; *Cloverleaf Butter v. Patterson*, 315 U.S. 148, 86 L. Ed. 754, 62 S. Ct. 491; *Prudential v. Benjamin*, 328 U.S. 408, 90 L Ed. 1342, 66 S. Ct. 1142; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815; *Bethlehem Steel v. New York*, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026; *H. P. Hood v. DuMond*, 336 U.S. 525, 93 L. Ed. 865, 69 S. Ct. 657; *Castle v. Hayes Freight Line*, 348 U.S. 61, 99 L. Ed. 68, 75 S. Ct. 191; *Pennsylvania v. Nelson*, 350 U.S. 497, 100 L. Ed. 640, 76 S. Ct. 477.

Broadcasting has been held to be national in its scope by at least two decisions of this Court. In *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650, 80 L. Ed. 956, 56 S. Ct. 608, it was said on page 655:

> "By its very nature broadcasting transcends state lines and is national in its scope and importance, characteristics which bring it within the purpose and protection, and subject to the control of the commerce clause."

The instrumentalities of broadcasting were set forth on page 652 of the opinion and included among other elements was the transmitter.

Again in *Radio Commission v. Nelson Brothers*, 289 U.S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, it was stated on page 279 of the opinion:

> "No state lines divide radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities."

Other cases holding the same are *Whitehearst v. Grimes*, 21 F. 2d 787; *Station WBT v. Poulnot*, 46 F. 2d 671; *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153, *cert. den.* 340 U.S. 929, 95 L. Ed. 670, 71 S. Ct. 490.

Thus the attempt by the State of Ohio to levy a local tax, even indirectly, on the privilege to use broadcast transmitting equipment in interstate commerce or to install it for such use is an unconstitutional invasion of a province exclusively within the bounds of federal jurisdiction, *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L. Ed. 68, 58 S. Ct. 72; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815. The privilege of use is derived from the federal government, not the state, and if a tax is to be imposed upon that privilege or any incident necessary to its exercise such as installation for use it must be by the federal government or by express legislative permission of the federal government.

The extent of federal jurisdiction over broadcasting is shown by reference to Title 47 USCA, Section 151, which creates the Federal Communications Commission; Section 153 (b) which defines "Radio communications" to include transmission of the signal and "all instrumentalities, facilities, apparatus, and services . . . . incidental to such transmission"; Section 153 (d) which defines "Transmission of energy by radio" to include "all instrumentalities, facilities, and services incidental to such transmission"; Section 303 (n) which vests the Federal Communications Commission with authority over the installation of transmitting equipment; and Section 319 which vests the Commission with authority over the construction of radio stations and transmitting equipment to be installed in the station.

So completely has the federal government pre-empted the field of broadcasting including not only the actual operation of the transmitter but as well all acts incidental

hereto such as the installation of the transmitter in construction of the station that no margin of power is left or the state to impose its tax on those privileges of use. As was held in *Whitehearst v. Grimes*, 21 F. 2d 787, page 87:

> "Such (radio) communications admit of and require a uniform system of regulation and control through the United States, and Congress has covered the field by appropriate legislation." (parenthetical matter added)

The practical consequences of a state use tax on the installation or use of transmitting equipment are apparent. Through such a tax a state could easily discourage the location of stations within its borders and could even affect a freeze on new installations to the benefit of already existing stations, *Magnano v. Hamilton*, 292 U.S. 40, 78 L. Ed. 1109, 54 S. Ct. 599. Hence by the device of a use tax upon the installation or use of transmitting equipment the state could not only control the broadcast service rendered but also the stations rendering it, and the effect of that control would necessarily extend beyond the state's borders since the stations broadcast into other states. This, of course, is the type of interference which the Communications Act (47 USCA, Chapter 5) was especially designed to eliminate.

Since broadcasting is national in its scope, and the Congress has pre-empted the field, the levy of a state's use tax under Section 5741.02, Revised Code of Ohio, upon the use, or installation for use, of broadcasting equipment is in opposition to the commerce clause of the Constitution of the United States and therefore unconstitutional.

VII

CONCLUSION

Because the questions presented by this appeal are substantial and of sufficient importance to warrant review and final determination by this Court, the appellant respectfully requests that this appeal be allowed. Should the decision of the Supreme Court of Ohio be permitted to stand, then not only may interstate commerce be taxed but it may be taxed discriminately and in areas where the Congress has exclusive jurisdiction and has acted affirmatively to assume plenary control thus pre-empting the field. And these questions have a bearing not only on broadcasting but on every interstate business.

Alternatively, should the appeal not be allowed, appellant respectfully requests that certiorari be granted.

Respectfully submitted,

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APPENDIX I

Entry Of Board Of Tax Appeals

This appeal is from a final order of the Tax Commissioner under date of July 31, 1956, wherein appellant's claim for refund of $9,086.99 for use taxes claimed to have been illegally assessed and paid by it was denied. The basis of the claim is predicated on the payment in error on radio and broadcasting equipment for use in interstate commerce. It contends that at the time of payment of the assessment it had no knowledge of the judgment of the Supreme Court of the United states rendered in the case of Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, 297 U. S. 650, 80 L. Ed. 956, under date of March 30, 1936, which holds that

> "A state occupation tax measured by the gross receipts from radio broadcasting stations within the state licensed to broadcast, and broadcasting, over an area embracing other states, is an unconstitutional burden upon interstate commerce."

This cause now comes on for further and final consideration upon appellant's notice of appeal, the Tax Commissioner's transcript and assessment order, a stipulation of facts filed herein on January 11, 1957, and briefs of counsel. The agreed facts are as follows:

> "(1) The appellant, Tri-City Broadcasting Company owns and operates television station WTRF-TV, with studios in Wheeling, West Virginia, and transmitter at Bridgeport, Ohio. Appellant's transmitter broadcasts principally over a tri-state area, including Ohio, West Virginia, and Pennsylvania, (See Exhibit 'B'), under license granted by the Federal Communications commission, with an assigned frequency of 174 to 180 megacycles, and an assigned visual power of 360 kilowatts. Approximately two-thirds of appellant's view-

ers are outside of Ohio, and approximately three-fourths of appellant's advertisers are outside of Ohio.

"(2) All of appellant's programs originate either at its studios in Wheeling, or at various studios of the National Broadcasting Company's network affiliates throughout the country. All programs are carried from appellant's control room in its studios at Wheeling to the transmitter by way of a telephone cable across the Ohio River, and from the transmitter to receiving sets in the tri-state area (See Exhibit 'B').

"(3) Appellant purchased outside of Ohio from Radio Corporation of America, Camden, New Jersey, certain items of transmitting equipment to be employed in the transmitter at Bridgeport. (See Exhibit 'A'). Use Tax on these items was paid under direct pay permit No. 129-M. For purposes of this case, Ohio purchases and the sales tax thereon have been conceded.

"(4) The items of equipment in question, which have been listed in Exhibit 'A', were shipped, ready for installation, by motor freight directly from Camden, New Jersey to the transmitter at Bridgeport. Under operating authority granted by the Federal Communications Commission (Permit No. BMPCT—1825), the station began transmitting operations on July 30, 1953. Thereafter appellant installed additional items of transmitting equipment (See Exhibit 'A') as they arrived at the transmitter, within one to three days after arrival, to bring the transmitter's power up to the permitted assigned power of 360 kilowatts. The items have been used in the transmitter ever since.

"(5) Exhibit 'A', includes no storage inventories or inventories of replacement parts."

Exhibit "A" sets up thirty items purchased between August 7, 1953, and October 27, 1954, inclusive, and their purchase price totals $241,524.97. Exhibit "B" is a map which displays the broadcasting coverage of appellant over portions of Ohio, West Virginia and Pennsylvania, with Wheeling, West Virginia and Bridgeport, Ohio, which lie

n opposite banks of the Ohio River, as its center. All hirty items are transmitting equipment.

The amount claimed in applicant's claim for refund, ompared with the purchase price of the thirty items cov-red in Exhibit "A", reflects the fact that appellant's pres-nt appeal covers only that portion of the assessment which overs the thirty items noted. The board considers that he claim for the remainder of the total assessment is with-lrawn or abandoned.

Appellant complains of the order in four respects:

1. "The assessment is unconstitutional for the reason that the items and equipment assessed are used in interstate commerce for radio and television broadcasting.

2. "The items and equipment are used in interstate commerce for radio and television broadcasting, and therefore are exempted under Sections 5739.02 (11), and 5741.02 (3), Revised Code.

3. "The sales of the items and equipment are exempted under Section 5739.02 (11), Revised Code, for the reason that they were interstate sales.

4. "The assessment denies appellant equal protection of the laws, since other items are exempted if purchased for use in interstate commerce."

Those portions of Revised Code Sections 5741.02 of the Use Tax Act, and Section 5739.02 of the Sales Tax Act, that are herein involved, read as follows:

Section 5741.02, Revised Code:

"(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased for storage, use, or other consumption in this state, as follows:

"(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances: • • •

"(2) When the tangible personal property is purchased for a use which would exempt the sale of such tangible personal property from the tax imposed by section 5739.02 of the Revised Code;

"(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;"

Section 5739.02, Revised Code:

"(B) The tax does not apply to the following:

"(11) Sales not within the taxing power of this state under the constitution of the United States;"

The commerce clause of the federal Constitution reads, that

"the Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The court, in Trotwood Trailers Inc. v. Evatt, 142 Ohio State, 197, at page 202, quoting from 47 Amer. Jur., 209, Section 10, says:

"One of the most baffling problems in connection with the validity of sales tax legislation is the effect thereupon of the commerce clause of the federal Constitution * * *. With respect to the application of this constitutional provision upon state taxation generally, the broad rule is that while a state may not impose taxes directly upon interstate or foreign commerce,

it may under certain circumstances impose taxes which may have some incidental effect upon such commerce, * * *."

The court, in the next succeeding paragraph, says:

"The taxation of property shipped interstate, before its movement begins or after it ends, is not forbidden."

Further on page 209 of the reported case appears the following:

"The change of possession from seller to purchaser is the taxable event regardless of the time and place of passing title to the merchandise in question."

In the latter case of Midwest Haulers v. Glander, 150 Ohio State, 402 (404), the same court holds:

"That a state may not impose a tax which is a burden on interstate commerce is an established principle of law. The General Assembly recognized this in providing in Section 5546-2, General Code, (now Revised Code Section 5739.02) that 'the tax hereby levied does not apply to the following sales:

"'8. Sales which are not within the taxing power of this state under the Constitution of the United States.'

"There is a similar provision in Section 5546-26, General Code, (now Revised Code Section 5741.02) pertaining to the use tax.

"It does not follow, however, that interstate commerce is immune from taxation by a state. The Supreme Court of the United States, in interpreting the commerce clause of the federal Constitution, in the case of Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 82 L. Ed. 823, 58 S. Ct., 546, 115 A. L. R., 944, stated in the fourth paragraph of the headnotes:

"'The commerce clause does not relieve those engaged in interstate commerce from their just share of the state tax burden, even though the cost of doing the business be thereby increased.' See, also, 51 American Jurisprudence, 262, Section 203.

"The sales and use taxes involved in the instant case are nondiscriminatory and do not have a tendency

> to prohibit interstate commerce; they are not levied on interstate commerce at all but affect such commerce only incidentially and are levied without discrimination against interstate and intrastate commerce. Only such sales as are made within the state are taxed, and not those sales outside its borders."

We have quoted extensively from these two Ohio cases for the reason that they are the only reported expression of our court's thinking on the present statutes involved. The conclusions therein noted lead this board to observe that the present query is not a sales tax, but a use tax assessment; which is to say that a sales tax is not or was not imposed on the transmission of equipment purchased, but a use tax, after the interstate shipment had been delivered to appellant at Bridgeport, and the interstate shipment had terminated and the property came to rest in Ohio. And, that, in the Fisher's Blend Station case the tax assessed was an occupational tax measured by its total gross receipts and assessed annually upon the right of doing business in the assessing state, which was a direct charge on the station's engagement in interstate commerce, and not a tax on its property. It was, therefore, an annual charge on the performance of the station's business of engaging in interstate comerce, which the court held could not be done in view of the constitutional inhibition. The Fisher's Blend case, however, does firmly establish the principle that appellant, in the dissemination of its program, is engaged in interstate commerce.

The principle issues in Midwest Haulers, supra, was whether or not the assessee was a common carrier engaged in the rendition of a public utility service, and its purchases and use of equipment were exempt under a different exemption provision which exempted retail sales from taxation upon the theory that such were purchased for the

purpose of being used in the rendition of a public utility service. In the present case the exemption claimed is upon the theory that the property was to be and is being used in interstate commerce and, hence, exempt from taxation because the commerce clause of the federal Constitution denies a state the right to so tax, which the state exemption section recognizes. However, from what is said by the court in the Trotwood and Midwest cases, and the decisions of the Supreme Court of the United States therein referred to, it becomes apparent that the commerce clause was never intended to become a shield barring all kinds of attempted state taxation, but only those classes of taxation that laid a direct charge on interstate commerce. The statutes of the state of Washington laid a direct charge on Fisher's Blend Station's annual gross receipts; hence, it was accordingly held violative of the commerce clause.

Since the Midwest case was decided upon a different exemption provision—that of property purchased for the purpose of being used in the rendition of a public utility service—decision in that case cannot be determinative of the present controversy where exemption is claimed because of its subsequent use in interstate commerce. The interstate shipment from New Jersey to Ohio was not taxed. The property had come to rest in Ohio and thereby acquired an Ohio situs. The use tax assessed was made against Ohio sitused property. The question, therefore, is: Does its subsequent use in interstate commerce exempt such property from use tax assessment under the commerce clause, and the laws of Ohio?

The recent work of Paul J. Hartman on "State Taxation of Interstate Commerce", pages 136 to 141, inclusive, under the heading of "Article transported interstate for consumption in an interstate business", deals specifically

with a state's right to levy a use and storage tax in such cases. Therein the author reviews the decisions of the United States Supreme Court cases on that subject, particularly Nashville, C. & St. Ry. v. Wallace, 288 U. S. 249; Edelman v. Boeing Air Transport, Inc. 289 U.S. 249; Southern Pacific Co. v. Gallagher, 306 U. S., 167, and Pacific Telephone & Telegraph Co. v. Gallagher, 306 U. S., 182. Nashville-Wallace, and Edelman-Boeing, both deal with the storage of gasoline within the taxing state which came to rest therein after interstate shipment, and which was thereafter to be used in whole or in part in interstate transportation. In Southern Pacific-Gallagher case the property involved was railroad equipment purchased outside and brought into the taxing state for both immediate and subsequent use in the operation of an interstate railroad. In the Pacific Telephone-Gallagher case it was telephone equipment for subsequent use in the maintenance and repair of an interstate communications system. In conclusion, Hartman, at page 141, observes as to two cases last noted:

> "In the Southern Pacific and Pacific Telephone decisions a part of the articles were sent from outside the state to the place of installation where they were immediately put into interstate operation. The entire movement was as nearly continuous as managerial efficiency can contrive.' The interval of taxable use was thus reduced to the very brief period of actual installation.
>
> "The group of cases involving use, storage and withdrawal taxes was not open to condemnation by the Helson principle, which forbids a tax upon the consumption or use of an article in interstate commerce. This group of cases, and precedents analogous to them, thus permits state taxation of events preliminary to interstate movement, even though the articles involved are intended for subsequent use in

interstate commerce, and even if the articles have just completed an interstate journey. There is a taxable moment, brief though it may be, when the articles have reached the end of an interstate trip and have not begun to be consumed or used in an interstate operation."

We think it appropriate to here set forth headnotes 3, 5 and 7 of the Southern Pacific case which are responsive to the court's conclusions:

"3. A state tax on the storage and use of tangible personal property bought outside the state by a railroad company engaged in intrastate and interstate commerce, temporarily stored in the state for the purpose of protection until use, and intended for immediate or subsequent installation or use as a part of the interstate transportation facilities, does not violate the commerce clause of the Federal Constitution, since the retention and installation of the property are intrastate taxable events, and there is a taxable moment when the property has reached the end of its interstate transportation and has not begun to be consumed in interstate operation of the railroad.

"5. The increased cost to an interstate operator from a tax on storage or installation of property intended for future use in interstate commerce is without significance in determining whether the tax violates the commerce clause.

"7. A state tax on the use and storage of property purchased outside the state, intended for use outside the state, and temporarily kept within the taxing state, is not in violation of the due process clause of the Fourteenth Amendment on the ground that it exacted for the consumption of the property outside the state upon its appropriation in the state to uses outside the state."

In these four cases it was considered that the use and storage tax assessed was levied against property the same as like goods subsequently used in intrastate commerce.

In Fisher's Blend Station v. Tax Commission, supra, (297 U. S., 665) the court says:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce."

We shall not repeat quotation of Sections (2) and (3) of Revised Code Section 5741.02, and that part of Section 5739.02 (B) and (11), heretofore set forth. When these Code provisions are read in conjunction with the authorities hereinabove noted, and the circumstances under which the articles were purchased, and the use to which they were put, it becomes apparent that use taxation of this property is not prohibited by the commerce clause or exempted from taxation under the laws of Ohio. Subsection (3) of Revised Code Section 5741.02 so provides in all such transactions with the single exception of fuel which thereafter is to be used in interstate commerce.

We think the principle involved in the Fisher's Blend case is decidedly different. It is this board's judgment that the Tax Commissioner correctly denied appellant's application for refund. The order appealed from is affirmed.

APPENDIX II

Entry of the Court of Appeals

Fall term, 1957. (January 4, 1958) This appeal from the Board of Tax Appeals of Ohio came on for hearing December 5, 1957, and pursuant to briefs and arguments by counsel, it was accordingly decided and held by this court that the Ohio use tax levied by Section 5742.02, Revised Code, is an excise tax levied only against personal property purchased for and used principally and primarily

in a taxable way; that broadcast transmitting equipment purchased by appellant Tri-City Broadcasting Company is used principally and primarily in interstate commerce; that therefore such equipment is exempted under the provisions of Section 5741.02 (C) (3), Revised Code; that to impose a use tax on the equipment would violate Article I, Section 8, Clause 3 of the Constitution of the United States; that to impose a use tax on the equipment would discriminate against interstate commerce and burden such commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States; that therefore, appellant's broadcast transmitting equipment can not constitutionlly be subjected to the use tax levied by Section 5741.02, Revised Code, and that a contrary holding would bring Section 5741.02, Revised Code, into conflict with Article I, Section 8, Clause 3 of the Constitution of the United States. The decision of the Board of Tax Appeals is reversed. To all of which the appellee Tax Commissioner except. No further opinion.

APPENDIX III

Syllabus, Opinion, Judgment and Order of the Supreme Court of Ohio

Judgment and Order

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Belmont County and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the decision of

the Board of Tax Appeals be, and the hereby is, affirmed and final judgment is rendered for Defendant.

It is further ordered and adjudged that appellant recover from appelle his costs expended in this Court and in the Court of Appeals taxed at $.....

Ordered, That a special mandate be sent to the Board of Tax Appeals of Ohio, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Belmont County, "for entry."

Syllabus and Opinion

Transmitting equipment purchased in interstate commerce and shipped from a point outside this state to a point within this state, for immediate installation in a radio and television transmitter under construction in this state, and installed therein within a few days after arrival for principal use thereafter in interstate broadcasts from such radio and television transmitter is subject to the use tax levied by Section 5741.02, Revised Code. This section does not violate clause 3, Section 8, Article I of the Constitution of the United States, providing that the Congress shall have the power "to regulate commerce with foreign nations and among the several states," for the reason that such tax is imposed on all property purchased for storage, use, or consumption in this state at a time when such property has come to rest within this state and is a nondiscriminatory tax which, when applied to the instrumentalities of interstate commerce, does not constitute a prohibited burden upon such commerce.

(No. 35571—Decided April 22, 1959.)

APPEAL from the Court of Appeals for Belmont County.

This cause originated after the issuance of a use-tax assessment against the appellee Tri-City Broadcasting Company, an Ohio corporation, which owns and operates a television station with studios in Wheeling, West Virginia, and a transmitter at Bridgeport, Ohio. The transmitter broadcasts over a tristate area, including Ohio, West Virginia and Pennsylvania, under a license granted by the Federal Communications Commission, and began transmitting operations on July 30, 1953.

The appelle purchased certain transmitting equipment outside Ohio to be used in the transmitter at Bridgeport. These items, purchased between August 7, 1953, and October 27, 1954, as set forth in the stipulation, were shipped by motor freight directly from Camden, New Jersey, to Bridgeport ready for installation and were installed within one to three days after arrival at the transmitter.

The appellee purchased certain transmitting equipment application for refund of the tax so paid, claiming the assessment to be unconstitutional for the reason that the items and equipment assessed are used in interstate commerce for radio and television broadcasting.

The Tax Commissioner, appellant here, refused to refund this tax and entered his order accordingly. An appeal was taken to the Board of Tax Appeals, which affirmed the order of the Tax Commissioner. Tri-City Broadcasting Company then appealed to the Court of Appeals for Belmont County, which reversed the decision of the Board of Tax Appeals, without opinion. In the journal entry it held "that the Ohio use tax levied by Section 5741.02, Revised Code, is an excise tax levied only against personal property purchased for and used principally and primarily in a taxable way; that broadcast transmitting is an interstate commerce activity; that broadcast transmitting equipment purchased by appellant Tri-City Broadcasting Company is used principally and primarily in interstate commerce; that therefore such equipment is exempted under the provisions of Section 5741.02 (C) (3), Revised Code; that to impose a use tax on the equipment would violate Article I, Section 8, clause 3 of the Constitution of the United States; that to impose a use tax on the equipment would discriminate against interstate commerce and burden such

commerce in violation of Article I, Section 8, clause 3 of the Constitution of the United States; that therefore, appellant's broadcast transmitting equipment can not constitutionally be subject to the use tax levied by Section 5741.02, Revised Code; and that contrary holding would bring Section 5741.02, Revised Code, into conflict with Article I, Section 8, clause 3 of the Constitution of the United States."

The cause is here as a result of the allowance of the motion of the Tax Commissioner to certify the record and on an appeal as of right.

Mr. Carlton S. Dargusch, Mr. Carlton S. Dargusch, Jr. and *Mr. Jack H. Bertsch*, for appellee.

Mr. William Saxbe and *Mr. Mark McElroy*, attorneys general, and *Mr. John M. Tobin*, for appellant.

Herbert, J. As stated by the appellant, " the essential question presented in this appeal * * * involves the determination of whether the Constitution of the United States prohibits taxation of incidents of interstate commerce; whether the Ohio use tax on equipment used in interstate commerce unduly burdens such commerce; and whether the tax can properly be levied upon any use in Ohio or is limited only to the 'principal and primary use.'"

Appellee states the issues as follows:

"Since admittedly the use of equipment in the stream of interstate commerce is an exempt use under the Ohio statute and the Constitution of the United States, the issues in his case can be summarized very simply thus:

"1. Does the Ohio statute tax, Section 5741.02, Revised Code, the momentary use (installation) of equipment which was purchased for an exempt use and which is used principally and primarily in an exempt activity?

"2. Does a tax on the momentary use (installation) of equipment purchased for and used principally and primarily in interstate commerce place an unconstitutional burden on such commerce in violation of the commerce clause of the United States Constitution?"

Unfortunately, neither statement can be accepted as a complete and accurate recital of the problem which confronts the court. Also, the appellant does not concede the premise on which the appellee bases its version of the two issues numbered above, namely, that the use of the equipment in the stream of interstate commerce is an exempt use under the Ohio statute and the Constitution of the United States. It would appear that the Court of Appeals accepted this premise as one of its conclusions in its journal entry.

Section 5741.02, Revised Code, provides in part:

"(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased for storage, use, or other consumption in this state * * *.

"* * *

"(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property purchased for such purpose, shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state * * *.

"(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

"* * *

"3. Property, the storage, use, or other consumption of which this state is prohibited from taxing by the Constitution of the United States, laws of the United States, or the Constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state * * *."

These are the pertinent portions of the use-tax law with which we are concerned here. It is apparent that there is no specific exemption in the statute which applies to the property of a radio or television station. The appellee contends that the second sentence of paragraph three quoted above is not reached in construing the use-tax statute with reference to appelle's property, apparently under the theory that the provisions of the first sentence prohibit the state from taxing such property.

Appellant insist that the second sentence is a limitation upon the application of the first sentence and is applicable to show a legislative intention that the property of the appellee shall not be exempt from the use tax unless the levy thereon is prohibited because of constitutional limitation.

Therefore, the issue before us is resolved down to the question as to whether the use tax here places an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States.

Admittedly, the broadcasting of radio and television programs is interstate commerce. *Fisher's Blend Station, Inc. v. State Tax Comm.*, 297 U. S., 650, 80 L. Ed. 956, 56 S. Ct., 608; *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S., 266, at 279, 77 L. Ed., 1166, 53 S. Ct., 627, 89 A. L. R., 406.

The tax involved in the *Fisher's Blend Station case*, however, was not a tax on property but rather on the gross receipts of the broadcasting station, so it is not pertinent to this situation. Nor does the case of *Whitehurst v. Grimes, Chief of Police*, 21 F. (2d), 787, cited by appellee, shed any light on the problem here.

The question of when a tax becomes a burden on interstate commerce has been considered by the Supreme Court of the United States in a number of cases.

In *McGoldrick, Comptroller, v. Berwind-White Coal Mining Co.*, 309 U.S., 33, 84 L. Ed., 565, 60 S. Ct., 388, 128 A. L. R., 876, Mr. Justice Stone, who delivered the opinion of the court, stated (at page 46):

"Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. * * * Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation."

See, also, the opinion of Mr. Justice Reed in the case of *Joseph, Comptroller, v. Carter & Weekes Stevedoring Co.*, 330 U. S., 422, at page 429, 91 L. Ed., 993, 67 S. Ct., 815.

Each of the cases of *Southern Pacific Co. v. Gallagher*, 306 U. S., 167, 83 L. Ed., 586, 59 S. Ct., 389, and *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U. S., 182, 83 L. Ed., 595, 59 S. Ct., 396, involved a tax on use and storage as applied to supplies purchased outside a state and brought in for prompt application in the operation of a public utility. The use tax in question there is similar

to that here and is described in the opinion in the *Southern Pacific case* as follows (page 171):

"The Use Tax Act is complemental to the California Retail Sales Tax Act of 1933. The later levies a tax upon the gross receipts of California retailers from sales of tangible personal property; the former imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government. Definitions in the Use Tax Act of taxpayer, retailer, storage and use are designed to make the coverage complete. A retailer is 'every person engaged in the business of making sales for storage, use or other consumption,'; use is the exercise of any right or power incident to ownership, except sale in the regular course of business; storage is any 'keeping or retention' with a similar exemption; and a taxpayer includes every one 'storing, using or otherwise consuming' the property subject to the use tax."

It is interesting to note that the property involved in the two California cases would have been exempted from tax under the Ohio use-tax because of the specific provision in Section 5741.02, Revised Code, that, "when the purpose of the consumer is * * * to use or consume the thing transferred * * * directly in the rendition of a public utility service" such property is tax exempt. It is not claimed here, however, that the appellee is rendering a public utility service within Ohio statutory definitions.

Appellant asks the question, "whether the tax can properly be levied upon any use in Ohio or is limited only to the 'principal and primary use.'"

Appellee contends that the "principal and primary use" by it of the property taxed should be determined to be in the maintenance and operation of the radio station in interstate commerce and therefore should be tax exempt, as otherwise the imposition of such a tax would be a burden on such interstate commerce.

In the case of *Southern Pacific Co. v. Gallagher, supra*, it is stated:

"The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage,' no further inquiry is necessary as to the rest of the articles which are subject to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership respectively was effective. The interstate movement was complete. The interstate consumption had not begun."

There is no dispute that the items taxed were delivered to the appellee at Bridgeport, Ohio, from Camden, New Jersey, and at the various times of arrival such property had come to rest in Ohio, the interstate movements having been completed. In fairness to the appellee, it does not even contend here for exemption from use tax because of the interstate nature of the initial delivery of these items at Bridgeport. It is also undisputed that shortly

after delivery of these items they were all installed in the transmitter at the station.

In the imposition of the use tax here we see no need of drawing a fine distinction between the basis of temporary storage of these items followed by relatively immediate installation and the basis as contended for by appellee of the "principal and primary use" of operating the transmitter in interstate commerce.

In the *Pacific Telephone & Telegraph case*, the court stated (page 187):

"The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co. v. Gallagher, ante*."

In those two cases the United States Supreme Court clearly recognized the right of the state to tax items such as those here under consideration at the moment of completion of interstate shipment into the state and the retention and installation. However the subsequent use of the equipment in interstate commerce such as the appelle contends to be the "principal and primary use" of the items here under consideration is disposed of further in the opinion in the *Southern Pacific case, supra*, in the following language (page 177):

" 'Practical continuity' does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing

taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operation as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and foreign commerce to the Congress."

By the foregoing test we are led to the conclusion that there is no interference by the state of Ohio with interstate commerce under the circumstances presented in this case. The use tax imposed on the personal property of the appelle here is imposed in every instance where a person in Ohio uses goods purchased at retail outside Ohio and brought into this state for use here, excepting of course the specified statutory exemptions. Certainly, real estate in Ohio is not tax exempt solely because it may be used in interstate commerce.

The use tax is not applied on the basis of residence or non-residence of the taxpayer but rather upon the sole test of use in Ohio and is applicable to the use of personal property in Ohio regardless of whether it is used in interstate or intrastate commerce, assuming, of course, that it it not otherwise exempt.

None of the three cases of *Erie Railroad Co. v. Peck, Tax Commr.*, 160 Ohio St., 322, 116 N. E. (2d), 304; *Mead Corp. v. Glander, Tax Commr.*, 153 Ohio St., 539, 93 N. E. (2d), 19; and *Rochez Bros., Inc., v. Bowers, Tax Commr.*, 166 Ohio St., 396, 143 N. E. (2d), 123, relied upon by appellee is pertinent here, inasmuch as each of those cases

was determined solely upon a construction of the words of the Ohio use-tax statute, and none involved a question of burden on interstate commerce.

In the recent six to three decision of the United States Supreme Court in the cases of *Northwestern State Portland Cement Co. v. State of Minnesota*, and *Williams, State Revenue Commr., v. Stockham Valves & Fittings, Inc.* (decided February 24, 1959), 3 L. Ed. (2d), 421, income tax laws of two states, Minnesota and Georgia, were held valid which levied taxes "on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing state when those activities are exclusively in furtherance of interstate commerce."

That decision is a departure from the former rigid rule as applied to state taxation of net income of corporations received in interstate commerce, and it is of interest here not so much to indicate the impartiality of the Ohio use tax as to all corporations, foreign or domestic, whether engaged in interstate or intrastate commerce (except for exempted use specified therein), but as indicating an attitude on the part of the highest court to refrain from interfering with the states in their reasonable efforts to secure tax revenues for themselves with respect to businesses engaged in interstate commerce.

We conclude, therefore, that transmitting equipment purchased in interstate commerce and shipped from a point outside this state to a point within this state for immediate installation in a radio and television transmitter under construction in this state, and installed therein within a few days after arrival for principal use thereafter in interstate broadcasts from such radio and television transmitter is subject to the use tax levied by Section 5741.02, Revised Code. This Section does not violate clause 3,

Section 8, Article I of the Constitution of the United States, providing that the Congress shall have the power "to regulate commerce with foreign nations and among the several states," for the reason that such tax is imposed on all property purchased for storage, use, or consumption in this state at a time when such property has come to rest within this state and is a nondiscriminatory tax which, when applied to the instrumentalities of interstate commerce, does not constitute a prohibited burden upon such commerce.

The judgment of the Court of Appeals is, accordingly, reversed and final judgment rendered for the Tax Commissioner.

Judgment reversed.

Weygandt, C. J., Zimmerman, Taft, Matthias and Bell, JJ., concur.

APPENDIX IV

Notice of Appeal to Court of Appeals

Appellant, the Tri-City Broadcasting Co., herewith gives Notice of Appeal from a decision of the Board of Tax Appeals rendered May 29, 1957, being Case No. 32,663 (Sales & Use Tax), a full and complete copy of which decision is attached hereto and incorporated herein.

The errors therein complained of are as follows:

(1) The Board erred in holding that television transmitting equipment used principally and exclusively in interstate commerce was subject to the Ohio Use Tax.

(2) The Board of Tax Appeals erred in denying exemption from the Ohio Use Tax for appellant's television transmitting equipment used principally and exclusively in interstate commerce, such equipment being exempted under Section 5741.02, Revised Code.

(3) The Board of Tax Appeals erred in holding that appellant's transmitting equipment used principally and exclusively in interstate commerce was subject to the Ohio Use Tax, such holding being discriminatory to interstate commerce, under Article I, Section 8, of the Constitution of the United States of America.

(4) The Board of Tax Appeals erred in holding that appellant's television transmitting equipment used principally and exclusively in interstate commerce was not immune from the Ohio Use Tax under Article I, Section 8, of the Constitution of the United States of America.

(5) The Board of Tax Appeals erred in other respects in law and in fact apparent from its decisions, the face of the record and the transcript.

Respectfully submitted,

Carlton S. Dargusch, Sr.
Carlton S. Dargusch, Jr.
Jack H. Bertsch
Attorneys for Appellant

APPENDIX

Sections 5741.01 and 5741.02, Revised Code of Ohio

Section 5741.02, Revised Code of Ohio.

(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased for storage, use, or other consumption in this state, as follows:

(1) No tax, if the price for which such property has been purchased is less than forty-one cents;

(2) Two cents, if such price is more than forty cents and not more than seventy cents;

(3) Three cents, if such price is more than seventy cents and not more than one dollar;

(4) If such price is in excess of one dollar, three cents on each full dollar thereof; and if such price is not an even number of dollars; then, in addition to said tax on each dollar, one cent, if such price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents, if such excess is more than forty cents and not more than seventy cents; and three cents, if such excess is over seventy cents.

(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property purchased for such purpose, shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided that a prepaid tax receipt, given to the consumer in accordance with section 5741.04 of the Revised Code, or the prepayment of the tax in accordance with section 5741.05 of the Revised Code shall relieve the consumer from further liability for the tax to which such receipt refers.

(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property under the following described circumstances:

(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31, inclusive, of the Revised Code, and when said excise tax is expressly made inapplicable to the sale of property in this state by divisions (B) (1), (B) (2), (B) (4), (B) (6), (B) (7), (B) (8), (B) (9), (B) (13), (B) (14), and (B) (15) of section 5739.02 of the Revised Code;

(2) When the tangible personal property is purchased for a use which would exempt the sale of such

tangible personal property from the tax imposed by section 5739.02 of the Revised Code;

(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this State. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce; but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commeree which is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;

(4) Property purchased from a seller who is not engaged in the business of selling tangible personal property except the purchase of motor vehicles or house trailers for storage, use, or other consumption in this state.

For the purpose of the proper administration of sections 5741.01 to 5741.22, inclusive, of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that tangible personal property purchased by any person for delivery in this state is purchased for storage, use, or other consumption in this state.

Section 5741.01, Revised Code of Ohio.

As used in sections 5741.01 to 5741.22, inclusive of the Revised Code:

(A) "Persons" includes individuals, firms, partnerships, associations, joint-stock companies, corporations, and combinations of individuals of any form.

(B) "Storage" means and includes any keeping or retention in this state for use or other consumption in this state for any purpose except as provided in division (C) of this section.

(C) "Use" means and includes the exercise of any right or power incidental to the ownership of the thing used, except as provided in this division of this section.

When the purpose of the consumer is any of the following: (1) To resell the thing purchased in the form in which the same has been received by him; (2) To incorporate the thing purchased, as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining, or to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, processing, refining, or mining, including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, and persons engaged in rendering farming, agricultural, horticultural, or floricultural services, and services in the exploration for and production of crude oil and natural gas, for others, are deemed engaged directly in farming, agriculture, horticulture, or floriculture, or exploration for and production of crude oil and natural gas, for others, are deemed engaged directly in farming, agriculture, horticulture, or floriculture, or exploration for and production of crude oil and natural gas; or directly in making retail sales or directly in the rendition of a public utility service; (3) To hold the thing transferred as security for the performance of an obligation of the seller, or to use or consume the thing transferred directly

in industrial cleaning of tangible personal property; or the commissioner may regard him as such agent, and may to use or consume the thing transferred directly in the rendition of towel and linen service or supply; such service or supply is not deemed a rental, but is deemed a personal service transaction; (4) To resell, hold, use, or consume the thing transferred as evidence of a contract of insurance; (5) To use or consume the thing directly in commercial fishing; the attainment of such a purpose shall not be considered to be a storage, a use, or a consumption of the thing purchased.

(D) "Purchase" means acquired for a consideration, whether such acquisition was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer was absolute or conditional, and by whatever means the same was effected; and whether the consideration was a price, rental in money, or exchange. Purchase includes production, even though the article produced was used, stored, or consumed by the producer. The tranfer of copy-righted motion picture films for exhibition purposes is not a purchase, except such films as are used solely for advertising purposes.

(E) "Seller" means the person from whom a purchase is made, and includes every person engaged in this state or elsewhere in the business of selling tangible personal property for storage, use, or other consumption in this state; and when, in the opinion of the tax commissioner, it is necessary for the efficient administration of sections 5741.01 to 5741.22, inclusive, of the Revised Code, to regard any salesman, representative, peddler, or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates, or from whom he obtains tangible personal property, sold by him for storage, use, or

other consumption in this state, irrespective of whether or not he is making such sales on his own behalf, or on behalf of such dealer, distributor, supervisor, or employer, regard such dealer, distributor, supervisor, or employer as the seller.

(F) "Consumer" means any person who has purchased tangible personal property for storage, use, or other consumption in this state.

(G) "Price" means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered by a consumer to a seller in the complete performance of the transaction by which tangible personal property has been purchased for storage, use, or other consumption in this state, without any deduction on account of the cost of the property sold, cost of materials used, labor or service costs, interest or discount paid, or any other expense. If a consumer produces the tangible personal property used by him, the price is the usual and ordinary consideration paid for such tangible personal property. The tax collected by the seller from the consumer under such sections is not a part of the price, but is a tax collection for the benefit of the state, and, except for the discount authorized under section 5741.07 of the Revised Code, no person other than the state shall derive any benefit from the collection or payment of such tax.

(H) "Engaged in the business of selling in this state" means and includes having, maintaining, occupying, or using within this state, directly or indirectly, any office, distribution house, sales house, warehouse, or other place of business, or having any agent or representative operating within this state for the purpose of selling tangible personal property or for the purpose of taking or soliciting orders for tangible personal property, irrespective of

whether such place of business, agent, or representative is located here permanently or temporarily, or whether the seller is legally qualified to do business within this state.

APPENDIX VI

Notice of Appeal to the Supreme Court of Ohio and Assignment of Errors

Notice of Appeal

Stanley J. Bowers, Tax Commissioner of Ohio, appellant, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment rendered on January 2, 1958, and journalized on February 14, 1958, by the Court of Appeals of Belmont County, Ohio, Seventh Appellate District, which judgment reversed the final decision of the Board of Tax Appeals in favor of the appellant.

This appeal is on questions of law and is taken both on a constitutional question and on condition that a motion to certify be allowed by the Supreme Court.

William Saxbe,
Attorney General.
John M. Tobin,
Assistant Attorney General

Assignment of Errors

The Court of Appeals erred in the following respects:

1. In holding that the decision of the Board of Tax Appeals was unreasonable and unlawful and in reversing the same.

2. In holding that the broadcasting equipment of the appellee was used principally and primarily in interstate commerce and that therefore the Ohio use tax was improperly assessed against such equipment.

3. In holding that the broadcasting equipment of the appellee was used principally and primarily in interstate commerce and that therefore such equipment was exempted from the Ohio use tax by Section 5741.02 (c) (3), Revised Code.

4. In holding that the Ohio use tax was discriminatory as to interstate commerce and a burden upon such commerce and violative of Article I, Section 8, Clause 3 of the Constitution of the United States.

Filed, Supreme Court of Ohio, March 26, 1958.

APPENDIX VII

Circular No. 10, Department of Taxation

In determining the application of the sales and use taxes on purchases of equipment or material to be used for both taxable and exempt purposes, we are guided by the decision of the Ohio Supreme Court in the case of *Mead v. Glander.* The court held there was no authority for the splitting of a piece of property owned by one person for the purpose of taxation so that one part would be exempt from taxation and the other part subject to the application of the tax.

The following principles should be followed as a guide in making audits and assessments:

"1. Where a single item of equipment is concerned the primary use of said equipment determines its taxability. If the equipment is used primarily in a way which excepts its purchase from the sales or use tax, its incidental use otherwise will not defeat the exception. Conversely, if the equipment is used primarily in a manner which subjects it to the application of the sales and use tax, its incidental use in an excepted manner will not defeat its taxability. (Primary use is determined to mean majority use.)

"2. On the question of fungible goods, such as coal and other divisible items, the department shall continue the policy of taxing that portion which is used for non-excepted purposes, providing it is possible to determine said portion. In setting up such items, the examiner should refrain as far as possible from the use of percentages, but should set the items up in units, for example, on coal, so many tons taxable, not a percentage of coal purchased taxable."

These same principles must be followed in advising vendors and others making sales of tangible personal property to be used for dual purposes. *Circular No. 10, Department of Taxation*, June 1, 1953.

APPENDIX VIII

Prentice-Hall

State and Local Taxes, Ohio, Paragraph 21, 134.14: 134.14:

"*Primary use controls.* — If equipment is employed principally in a way that excepts its purchase from the sales and use tax, its incidental use otherwise will not destroy the exemption. *Mead Corp v. Glander*, (1950) 153 O.S. 539, 42 O.O. 24, 93 N.E. 2d 19; *International Derrick & Equipment Co. v. Glander*, BTA #16683, 6-20-50, *Jeffers v Peck*, BTA #21975 and 22990, 3-16-53; *Circular* #10, 6-1-53."

Commerce Clearing House

State Tax Reporter, Ohio, Vol. 2, Paragraph 60-209.40:

"*Primary use.* — A hyster jack used 65% of the time directly in the production of tangible personal property for sale by manufacturers and processors is entitled to be free from the imposition of the sales tax since it primary use determines its excepted status. This decision follows that laid down in *Mead-Corp. v. Glander* ('50), 153 O.S. 539, 93 N.E. 2d 19.

International Derrick & Equipment Co. v. Glander, Ohio BTA, June 20, 1950."

Commerce Clearing House

State Tax Reporter, Ohio, Vol. 2, Paragraph 60-227.65:

"*Primary purpose.* — A declaration by a taxpayer that he purchased goods intending to use them in the rendition of a public utility cannot be the test of taxability; actual use must be the controlling factor. An article's exempt status hinges on its major, dominant and primary use; the mere fact that it is used occasionally for an exempt purpose does not give its purchase exemptability, *Jeffers v. Peck*, Ohio BTA, March 16, 1953."

APPENDIX IX

Statutes of California, 1935 (Cal. Stat. 1935) Chapter 361

Section 1. This act is known and may be cited as the "Use Tax Act of 1935".

Section 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

(a) "Storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

(b) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business.

* * * *

Section 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this

State at the rate of three per cent of the sales price of such property.

Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of Section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer; provided further, that the board may by rule and reguation provide that a receipt from a retailer who does not maintain a place of business in this State shall also be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer.

Section 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(c) Gas, electricity and water, when furnished or delivered to consumers through mains, lines or pipes.

(d) Gold bullion, gold concentrates or gold precipitates, when sold by the producer or refiner thereof for storage, use or other consumption in this State.

(e) Property used for the performance of a contract on public works executed prior to August 1, 1933.

(f) Motor vehicle fuel, the gross receipts received from sales or distribution of which in this State are subject to the tax imposed thereon under the provisions of the "Motor Vehicle Fuel License Tax Act", and not subject to refund.

(g) Food Products Purchased for Human Consumption. "Food products" as used herein includes cereals and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetable and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products other than candy and confectionery, coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery. "Food products" does not include spiritous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars and soda fountain or in connection therewith.

The exemption of food products set forth herein is made subject to the condition that the gross receipts from retail sales of food products be exempted from the computation of the tax imposed by the Retail Sales Act, of 1933, and any amendments thereto; provided, however, that should the gross receipts from retail sales of food products not be exempted from the computation of the tax imposed by said act and any amendments thereto, or should the exemption of the gross receipts from sales of food products from the computation of the tax imposed by said act, and any amendments thereto be declared unconstitutional or should the exemption of food products set forth herein be declared unconstitutional then the rate of tax set forth in section 3 hereof shall be two per cent on and after July 1, 1935.

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OCT 10 1959
JAMES R. BROWNING, Clerk

No. 406

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

TRI-CITY BROADCASTING CO.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

TRI-CITY BROADCASTING CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

STATEMENT OPPOSING JURISDICTION.

The appellee in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

I.

STATEMENT OF CASE AND FACTS

The operative facts have been stipulated and are quoted in full on pages 7 and 8 of appellant's jurisdictional statement. The following is a summary of facts and history of this case.

Appellant owns and operates a television station with studios at Wheeling, West Virginia, and with the transmitter located in Bridgeport, Ohio. Appellant purchased certain items of transmitting equipment from Radio Corporation of America, Camden, New Jersey. Said items of equipment were shipped ready for installation by motor freight directly from New Jersey, to the transmitter at Bridgeport, Ohio. Pursuant to operating authority granted by the federal government, appellant began transmitting operations on July 30, 1953. Thereafter, appellant installed additional items of transmitting equipment as they arrived at the transmitter, within one to three days after arrival to bring the transmitter power up to its permitted assigned power.

The Tax Commissioner of Ohio issued a use tax assessment against appellant, an Ohio corporation, based on the use in Ohio of said transmitting equipment purchased outside the state of Ohio. Said assessment was paid and subsequent thereto the appellant made application on July 31, 1956, for refund of said use tax payment. The application was disallowed and appellant appealed to the Board of Tax Appeals of Ohio. The Board entered its decision holding that Section 5741.02, Revised Code of Ohio, imposed a use tax on the personal property in every instance where a person in Ohio uses goods purchased at retail *outside* Ohio and brought *into* this state for use here, excepting of course the specified statutory exemptions. An appeal was perfected to the Court of Appeals of Belmont County, Ohio. That Court reversed the decision of the Board of Tax Appeals. The Tax Commissioner then appealed to the Supreme Court of Ohio and said Court reversed the Court of Appeals, holding that the use tax was properly assessed.

II

QUESTION PRESENTED

The essential question presented is whether the Tax Commissioner properly refused to refund to appellant the use taxes it paid on the purchase of certain transmitting equipment. This question involves the determination of whether the Constitution of the United States prohibits a use tax upon the single local activity of storing and or installing the articles immediately before they begin to be used in an interstate operation. Put another way is a state prohibited from taxing goods purchased out of state; installed within the taxing state and said installation to be used as an instrumentality of interstate commerce?

III

ARGUMENT

A. Section 5741.02, Revised Code of Ohio, Does Not Burden or Discriminate Against Interstate Commerce.

Chapter 5741. of the Revised Code of Ohio, is titled Use tax; storage tax. Section 5741.02 of said chapter provides in pertinent part:

> "(A) For use of the general revenue of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased for storage, use, or other consumption in this state * * *
>
> "* * *
>
> "(B) Each consumer, storing, using or otherwise consuming in this state tangible personal property purchased for such purpose, shall be liable for the tax * * *
>
> "* * *
>
> "For the purpose of the proper administration of sections 5741.02 to 5741.22, inclusive, of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that tangible personal property purchased by any person for delivery in this state is purchased for storage, use, or other consumption in this state."

The appellant, in attempting to establish its contention that the tax does not apply, has relied upon the following portion of Section 5741.02, Revised Code, the levying statute:

> "(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following circumstances:
>
> "* * *

> "(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. * * *"

This provision makes the use tax inapplicable if the tax is prohibited by the Constitution or laws of the United States and the constitution of Ohio. The definition section of this Chapter, Section 5741.01, Revised Code, contains a legislative definition of "*use*" which establishes the sense in which that term must be applied in this case. The legislative definition is:

> "(C) 'Use' means and includes the exercise of any right or power incidental to the ownership of the thing used, except as provided in this division of this section."

Following this definition are five exceptions, none of which are pertinent to this appeal.

At the outset it is incumbent upon the Tax Commissioner to state that appellant's approach to the problem here presented is such that it evades the true issues before this Court and tends to confuse or mislead. The taxpayer considers Section 5741.02 (C), Revised Code, *as if* it read: The tax does not apply to property purchased for use in interstate commerce.

The actual language of that statute reads in pertinent part:

> "The tax does not apply to the storage, use, or consumption in this state of * * *
>
> "(3) Property, the storage, use or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. * * *"

Section 5741.02, Revised Code, contains a presumption of taxability. Therefore, a rule of strict construction ob-

tains in applying the exemption of subsection (C) (3) of the statute so that any ambiguity or doubt as to taxability should be resolved in favor of the taxing authority.

Appellant strenuously urges that Ohio use tax, imposed by this statute, cannot be apportioned between exempt and nonexempt uses; that the incidence of the tax is upon the principal and primary use of equipment; and that therefore the Ohio Use Tax Statute does not tax incidental storages or uses when the principal and primary use of the equipment is exempt. Appellant seeks to buttress these contentions by citing *Mead Corp. v. Glander*, 153 Ohio St., 539, 93 N.E. 2d, 19; *Erie Railroad Co. v. Peck*, 160 Ohio St., 322, 116 N.E., 2d, 304; *Rochez Bros., Inc. v. Bowers*, 166 Ohio St., 396, 143 N.E. 2d, 123. The Supreme Court of Ohio dismissed these arguments of appellant by stating in its decision:

> "None of the three cases * * * is pertinent here, inasmuch as each of those cases was determined solely upon a construction of the words of the Ohio Use-tax statute, and none involved a question of burden on interstate commerce." (Appellant's Jurisdictional Statement, Appendix III, pages 39-40.)

It is further submitted that the "*principal and primary use*" doctrine of Ohio is a concept of law which was developed in relation to the so-called *direct use* exemption from taxation. Direct use exemption can best be explained by quoting the specific portion of the statute involved. Section 5741.01, Revised Code, as previously stated, is the definitions section of the Ohio use tax provisions. Subsection (C) defines "Use" and follows with five exceptions, number 2 of which reads:

> "(2) To incorporate the thing purchased, as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining; or to use or consume the thing

transferred *directly in* the production of tangible personal property for sale by manufacturing, processing, refining, or mining, including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, and persons engaged in rendering farming, agricultural, horticultural, or floricultural services, and services in the exploration for the production of crude oil and natural gas, for others, are deemed engaged *directly in* farming, agriculture, horticulture, or floriculture, or exploration for and production of crude oil and natural gas; or *directly in* making retail sales or *directly in* the rendition of a public utility service; * * *" (Emphasis added)

Here and here alone has the "*principal and primary use*" doctrine been applied. No Ohio court has applied said doctrine to an exemption claimed upon the basis of prohibition against the tax because of the Constitution or laws of the United States, but has limited it to the above quoted exemption. We are not faced with the question of whether certain property is "used directly" in an activity. We are concerned with whether the Constitution or laws of the United States prohibit the imposition of Ohio use tax upon the use of the property involved.

Appellant has repeatedly clung to its assertion that Ohio has discriminated against interstate commerce by ignoring Ohio's "principal and primary use" doctrine and assessed the taxpayer "* * * because appellant is engaged in interstate commerce." (Appellant's Jurisdictional Statement, page 10)

Further appellant states that it was

"* * * selected for a special tax burden merely because it happens to be engaged in the field of interstate commerce." (Appellant's Jurisdictional Statement, page 13)

The appellee concedes and the Supreme Court of Ohio recognized that the broadcasting of radio and television programs is interstate commerce. Moreover, as observed by the Supreme Court of Ohio:

> "It does not follow, however, that interstate commerce is immune from taxation by a state. * * *" *Midwest Haulers, Inc. v. Glander*, 150 Ohio St., 402, at 404.

The mere fact that a company may be engaged in interstate commerce does not magically clothe the company in a blanket of exemption from all state taxes.

An interesting analogy to the case at bar was presented in *Memphis Natural Gas Co. v. Stone*, 335 U. S., 80, 92 L. Ed., 1832 (1948). In that case the state of Mississippi had imposed a franchise tax based upon the amount of capital used by the company within the state. The appellant did no local business within the state; it merely maintained a pipeline a distance of 135 miles across the state of Mississippi. Mr. Justice Reed, in delivering the opinion of the Supreme Court and in sustaining the tax, observed that the company was engaged only in interstate commerce and that the tax was based upon the cost of the portion of the pipeline located in Mississippi. At page 1839 of the opinion in the *Memphis Gas* case the following comments appear:

> "There is no question here of Due Process. The Gas Company's property is in the taxing state where the taxable incidents occurred. * * * The attack on the Mississippi statute is that it violates the Commerce Clause by putting a tax on the commerce itself.
>
> "The local incidents covered by the definition of doing business hereinbefore set out, Section 9312, Mississippi Code, supra, were said by the Supreme Court in this case to be "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system' in Mississippi. 201 Miss. 670, 674, 29 So. 2d 268, 270. The cases just cited in the

note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself. But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. Nippert v. Richmond, supra (327 US at 423, 90 L. ed. 764, 66 S. Ct. 586, 162 ALR 844). The incident selected should be one that does not lend itself to repeated exactions in other states. . . ." (Footnote omitted.)

Mr. Justice Reed concludes the opinion in these pertinent words:

". . . We think that the state is within its constitutional rights in exacting compensation under this statute for the protection its affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business." (p. 1844)

Mr. Justice Rutledge concurred and stated at pages 1844 and 1845 of the decision as reported in 92 *Lawyers' Edition*:

"In accordance with views which I have heretofore expressed, it is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned; it is nondiscriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; is duly apportioned, that is, does not

undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state.

"In this view the tax is not different in any substantial respect, for purposes of the commerce clause's prohibitive application, from the apportioned tax upon gross receipts from interstate transportation levied by New York and sustained by the decision recently rendered in Central Greyhound v. Mealey, 334 US 653, ante, 1633, 68 S. Ct. 1260. That tax is nonetheless one upon the commerce, although it is apportioned. The apportionment, however, guards it from the vice of taxing commerce done in other states and thus also from multiplication by them. In my view the same consequence follows here, in practical effect, both for the bearing of the tax and for saving its validity.

"It may be that for the purposes of this case there is little more than a verbal difference in so regarding the tax and in looking at it as one not 'upon' the commerce, although affecting it, but as being laid upon 'incidents' of the commerce or 'taxable events' taking place in Mississippi which are regarded as being 'sufficiently separate from' the commerce, whether by reason of the apportionment or otherwise, to sustain the tax. . . ."

It is submitted that the *Memphis Gas* case points out the rationale for state taxation of interstate commerce. Such commerce should not be and is not exempted from all state taxation. It must pay its fair share of state tax. Thus, even gross receipts of interstate commerce are subject to state taxation if the proper allocation is made. The basis for this, it would seem, is the selection of an incident peculiar to the state imposing the tax which thus assures the avoidance of "repeated exations" or multiplication of the tax. It seems to follows clearly then that when tangible personal property of a company engaged in interstate commerce acquires a situs in a particular state, the imposition of a tax on that property by the state does not directly

interfere with nor unduly burden interstate commerce. Perhaps the leading cases on the issues of the instant cause are two California cases decided by the Supreme Court of the United States in 1939: *Southern Pacific Co. v. Gallagher*, 306 U. S., 167, 83 L. Ed., 586, and *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U. S., 182, 83 L. Ed., 595. Both cases involved a tax on use and storage as applied to supplies purchased outside a state and brought in for prompt application in the operation of a public utility. The California Use Tax, like the Ohio Use Tax, is complemental to the California Retail Sales Tax. Property covered by the California Sales Tax is exempt under the California Use Tax. All tangible personal property sold or utilized in California (and Ohio), is taxed only *once* for the support of the state government.

In the *Southern Pacific* case, an interstate railroad purchased tangible personal property outside California, brought such property into the state and (1) installed it upon importation, or (2) kept it available for use. At page 171 of the official report, the Court set forth the applicable definitions in the California Use Tax Act, which definitions are practically identical to those found in the Ohio law, Section 5741.01, Revised Code. The Supreme Court of the United States properly categorized the tax at page 172, when it said that the tax was sought:

> "* * * from tangible personalty purchased out of the state for immediate or subsequent installation in an interstate railway facility."

At page 173, the Court said:

> "All purchases may be said to be dedicated to consumption in the interstate transportation business of appellant."

In discussing the property which was to be installed upon delivery, this Court stated at pages 176 and 177:

> "* * * In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage', no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think *there was a taxable moment* when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. *At that moment*, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate movement was complete. The interstate consumption had not begun. * * * *" (Emphasis added.)

On the same day that the *Southern Pacific* case was decided, the Court also handed down its opinion in *Pacific Telephone & Telegraph v. Gallagher, supra*. The taxpayer in that case operated a telephone and telegraph system in interstate and intrastate commerce. Certain property was purchased out of state and upon arrival was immediately installed. In sustaining the California Use Tax the Court relied upon the *Southern Pacific* case and said at page 187:

> "The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co. v. Gallagher, ante*."

The Supreme Court of Ohio, in ruling upon the instant case and commenting upon the *Southern Pacific* and the *Pacific Telephone* cases stated:

> "In those two cases the United States Supreme Court clearly recognized the right of the state to tax items such as those here under consideration at the moment of completion of interstate shipment into the state and the retention and installation. However the subsequent use of the equipment in interstate commerce such as the appellee contends to be the 'principal and primary use' of the items here under consideration is disposed of further in the opinion in the *Southern Pacific case, supra*, in the following language (page 177):
>
> "'Practical continuity', does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operation as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from instrumentalities of commerce and foreign commerce to the Congress.'"

The Supreme Court of Ohio concluded at page 133 and 134 of its opinion:

> "By the foregoing test we are led to the conclusion that there is no interference by the State of Ohio with interstate commerce under the circumstances presented in this case. The use tax imposed on the per-

sonal property of the appellee here is imposed in every instance where a person in Ohio uses goods purchased at retail outside Ohio and brought into this state for use here, excepting of course the specified statutory exemptions. Certainly, real estate in Ohio is not exempt solely because it may be used in interstate commerce.

"The use tax is not applied on the basis of residence or non-residence of the taxpayer but rather upon the sole test of use in Ohio regardless of whether it is used in interstate or intrastate commerce, assuming, of course, that it is not otherwise exempt."

In the treatise "*State Taxation of Interstate Commerce*," by Paul J. Hartman, Professor of Law, Vanderbilt University, published 1953 by Dennis & Co., Inc., Library of Congress Catalog Card No. 53-11622, the author deals with a state's right to levy a use tax in cases such as presented here. Professor Hrtman discusses many decisions of the United States Supreme Court, beginning with the first case on the subject, i.e., *Nashville C. & St. L. Ry. v. Wallace*, 288 U. S., 249 (1933) and following the problem through various decisions, including the two California cases hereinbefore cited.

The author concludes, at page 141, in this manner:

"This group of cases, and precedents analogous to them, thus permits state taxation of events preliminary to interstate movement, even though the articles involved are intended for subsequent use in interstate commerce, and even if the articles have just completed an interstate journey. There is a taxable moment, brief though it may be, when the articles have reached the end of an interstate trip and have not begun to be consumed or used in an interstate operation."

Further, at page 146, the author reiterates:

"* * *, use and storage taxes upon the single local activity of storing or installing the articles immediately before they begin to be consumed in an inter-

state operation are valid, even though the State had a taxable grasp for only a brief moment. Also property taxes levied on the means and instrumentalities used to carry on interstate commerce are valid."

B. Broadcasting Is National in its Scope and Congress Has Pre-empted the Field—on Certain Matters.

Appellant argues that broadcasting is national in scope and Congress has pre-empted the field. To a degree this is admittedly a sound proposition of law. Appellant then concludes that the assessment of a use tax, even indirectly, on the privilege to use broadcast transmitting equipment in interstate commerce or to install it for such use, is an unconstitutional invasion of a province exclusively within the bounds of federal jurisdiction. This assertion by appellant cannot be sustained with even the broadest interpretation of the federal pre-emption doctrine. Appellant is literally claiming that since broadcasting is federally regulated, no state may tax, legislate, govern or control said broadcasting in any way, shape or form.

Appellant, in support of its pre-emption theories, states on page 17 of its jurisdictional statement that:

> "The practical consequences of a state use tax on the installation or use of transmitting equipment are apparent. Through such a tax a state could easily *discourage* the location of stations within its borders and could even *affect a freeze* on new installations to the benefit of already existing stations. *Magnano v. Hamilton* 292 U. S., 40, 78 L.Ed., 1109, 54 S.Ct., 599. Hence by the device of a use tax upon the installation or use of transmitting equipment the state could not only *control* the broadcast service rendered *but also the stations rendering it*, and the effect of that control would necessarily extend beyond the State's borders since the stations broadcast into other states. This, of course, is the type of interference which the Communications Act (47 USCA, Chapter 5) was especially designed to eliminate." (Emphasis added)

The most charitable comment that can be made of these charges and allegations is that they are highly misleading and without foundation. As stated previously this Ohio Use Tax is correlated to the Ohio Sales Tax. If an item is taxed in the latter, it is exempt in the former. Ohio use tax is *not* an annual tax. It is imposed *only* at the time that the property is brought *into* the state for use *within* the state. It cannot be repeated either by the state of Ohio in subsequent periods or by any other state. The tax is neither recurrent nor subject to multiplication. The incidence of tax is single. It is *not* a tax upon the privilege of engaging in interstate commerce. It is *not* a tax levied upon particular classes. It is an excise tax levied upon the sale or use of property. Appellant's charges that said tax could "*discourage*" location of stations, "*effect a freeze*" on new installations, "*control*" the broadcast service and control the stations rendering it are absurd to say the least. A mere recitation of these charges are sufficient to point out their merit.

In 1948-49 Stanford Law Review, 740, in an article entitled "*Gross Receipts Taxes on Radio Stations*", the author asks "Has Congress Pre-empted the Field?" and answers, at pages 740 and 741:

> "To protect the wave bands of each radio station in the limited broadcast spectrum, Congress passed the Federal Communications Act which required licensing of all stations. Since interference by other stations cannot be tolerated, this field requires uniform regulation. The Act therefore precludes state regulation of the transmission of radio waves regardless of whether the waves ever leave the state of origin.
>
> "The question then arises whether this Congressional action prevents the states from taxing the radio industry. This question must be answered in the negative * * * Congress has undertaken only to license radio stations. * * * *The Act makes no attempt*

to restrict the state's power to tax. * * * * (Footnotes omitted; emphasis added.)

Further, this Court is respectfully reminded that the Ohio use tax here in question is upon ~~an instrumentality~~ of interstate commerce *after* it was shipped into Ohio and *before* it was installed and or used in interstate commerce, i.e., transmitting television waves. The Ohio use tax in no way regulates broadcasting stations, wave lengths, licensing, or the like. The specific field pre-empted by the Congress of the United States remains intact.

IV

CONCLUSION

It is submitted that neither the Constitution of the United States nor the laws of the United States prohibit the imposition of a use tax upon goods purchased outside the taxing state and shipped in for use or storage in the taxing state. This is true even though the purchased goods are to be used and consumed in interstate commerce. A taxable event is present, however brief, at the instant the goods come to rest in the interstate journey and before they are used or consumed in the interstate business.

Further, it is submitted that although the Congress of the United States has recognized certain features of broadcasting require uniform legislation and has, therefore, pre-empted said matters, it does not follow as a necessary corollary that the state's power to tax has been restricted in any way.

V

MOTION TO DISMISS OR AFFIRM

For the foregoing reasons and based upon the foregoing authorities, this appellee moves that the court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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No. 406

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

TRI-CITY BROADCASTING CO.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO
Appellee.

REPLY TO STATEMENT OPPOSING JURISDICTION

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Appellee.

REPLY TO STATEMENT OPPOSING JURISDICTION

I.

Section 5741.02, Revised Code of Ohio, as Construed and Applied by the Supreme Court of Ohio, Burdens and Discriminates Against Interstate Commerce in Violation of the Constitution of the United States.

Nowhere in the statement opposing jurisdiction does the tax commissioner undertake to defend the discrimination which the Ohio Supreme Court's construction and application of Section 5741.02, Revised Code of Ohio, place upon interstate commerce. Instead he argues on page 5 that there is no exemption for interstate commerce in the use tax statute. Section 5741.02 (C) (3), Revised Code of Ohio, provides an exemption for uses which the state cannot

constitutionally tax, and this includes the use of interstate commerce instrumentalities, *Helson v. Kentucky*, 279 U.S. 245, 73 L. Ed. 683, 49 S. Ct. 279; *Cooney v. Mountain States Telephone and Telegraph Co.*, 294 U.S. 384, 79 L. Ed. 934, 55 S. Ct. 477; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 83 L. Ed. 586, 59 S. Ct. 389; *Pacific Telephone and Telegraph Co. v. Gallagher*, 306 U.S. 182, 83 L. Ed. 595; 59 S. Ct. 396; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815; *Station WBT v. Poulnot*, 46 F. 2d. 671.

But even without an exemption, it is absurd to argue that Ohio can impose an unconstitutional tax simply because its statute does not contain an exemption from the tax. The Constitution is still the supreme law of the land.

Turning next to page 7 of the commissioner's statement, he there asks this Court to construe the Ohio statute so that the principal and primary use rule will apply to the exemptions appearing in Section 5741.01, Revised Code of Ohio (the definition section) but not to those in Section 5741.02, Revised Code of Ohio (the levying section). This exact same argument was made below to the Ohio Supreme Court both in the brief and on oral argument and was flatly rejected. The Court drew no distinction between the two sections, and no such distinction has ever been drawn by Ohio courts. The argument was also rejected in this case by the Ohio Court of Appeals. And in any event questions of the construction of a state statute are beyond the jurisdiction of this Court.

Some preliminary remarks should be made about *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 92 L. Ed. 1832; 68 S. Ct. 1475, cited on page 8 of the commissioner's statement. The commissioner says that Mr. Justice Reed delivered the opinion of the Court. This is incorrect. Mr.

Justice Reed's opinion was concurred in by only two other justices. Mr. Justice Rutledge wrote a separate opinion in which no member of the Court concurred. And Mr. Justice Black concurred in the judgment but not in the opinions. The Chief Justice, together with three justices lodged a vigorous dissent. The case was decided five to four, with the majority divided—hardly a firm authority.

Of more importance, however, there was no issue of discrimination in the case, as there is here, and consequently it is inapplicable as authority for this case.

Aside from the *Memphis Natural Gas* case, the commissioner also quotes at length from *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, 83 L. Ed. 586, 59 S. Ct. 389, and *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U.S. 182, 83 L. Ed. 595, 59 S. Ct. 396. As was said in appellant's jurisdictional statement, the statute in the *Gallagher* cases taxed any and every use of property. Installation was, therefore, a taxable activity for all taxpayers alike. To the contrary, until the present case, the Ohio statute had without exception always been held to tax principal and primary use and never such minor incidental uses as installation. Despite this and even though the Ohio Supreme Court actually recognized that the principal and primary use of appellant's equipment is in interstate commerce and exempt from the tax on that ground, it nevertheless held that because interstate commerce was involved the extremely brief incidental use in installing the equipment was taxable. The statute thus construed raises an obvious and unjustifiable discrimination against interstate commerce which was absent in the *Gallagher* cases and the *Memphis Natural Gas* case.

The discrimination is actually conceded by the tax commissioner on page 6 of the statement where he attempts to distinguish *Mead Corp. v. Glander*, 153 Ohio St. 539, 93 N.E. 2d 119; *Erie Railroad Co. v. Peck*, 160 Ohio St. 322, 116 N.E. 2d 304; and *Rochez Bros. Inc. v. Bowers*, 166 Ohio St. 396, 143 N.E. 2d 123. These are the root cases which establish that the Ohio use tax is only against the principal and primary use. Now, why is it that these cases should not apply with equal force to interstate commerce? The reason given is quoted from the opinion of the Ohio Supreme Court on page 6 of the commissioner's statement:

> " 'None of the three cases * * * is pertinent here, inasmuch as each of those cases was determined solely upon a construction of the words of the Ohio Use-tax statute, and none involved a question of burden on interstate commerce. (Appellant's Jurisdictional Statement, Appendix III, pages 39-40.)' "

In other words, if the appellant were claiming another exemption besides burden on interstate commerce, the regular rule of principal and primary use would admittedly apply and the tax would not have been assessed. What more open admission of discrimination could possibly be made? Only those taxpayers engaged in interstate commerce activities have to pay tax on installation, no one else.

For the reasons stated above and those set forth in appellant's jurisdictional statement, appellant respectfully submits that the issues of discrimination and burden to interstate commerce are substantial.

II.

Broadcasting is National in its Scope and Congress has Pre-empted the Field.

A few brief comments will answer the commissioner's argument on this topic. On page 16 of the statement he says that the use tax will have no effect on interstate commerce because it is imposed but once. To quote his language: "It is imposed *only* at the time that the property is brought *into* the state for use *within* the state." Of course, the use is not confined "within" the state, but extends beyond the state. And a state by means of this kind of tax can prevent the installation of broadcasting equipment through a use tax on that installation. This means that a state can exercise control over broadcasting in its interior, and it means as well that it can extend the control to other states. The tax needn't be annual for that purpose; the power to impose the tax once at the beginning on installation is enough because the very existence and continued operation of any broadcasting station depends upon the periodic installation of new equipment for that which has become obsolete or worn out, and the instant tax falls directly on that installation.

Finally, the comment from 1948 49 Stanford Law Review, page 740, is the opinion of an editorialist, and even if it were authority, it is discussing gross receipts taxes which, unlike the instant tax, are laid upon receipts rather than upon a necessary and indispensable use of the means of broadcasting. That privilege of use is derived exclusively from the federal government, and it is protected exclusively by the federal government. The fact that the government has seen fit not to tax the use is suffi-

cient evidence of its intent that it be free from tax, and this intent cannot be frustrated or thwarted by the State.

Appellant concludes that the question of pre-emption of the field of broadcasting is substantial and of sufficient importance to merit review by this Court.

III.

CONCLUSION

Appellant respectfully renews its request that this appeal be allowed or, alternatively, should the appeal be denied, that certiorari be granted.

Respectfully submitted,

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